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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

MILLER BREWING COMPANY, a Wisconsin corporation,
Appellant,

v.

THEODORE JONES as Director of Revenue of the State of Illinois.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

STATEMENT AS TO JURISDICTION

Appellant, MILLER BREWING COMPANY, a Wisconsin corporation, appeals from the final order and judgment of the Supreme Court of Illinois entered September 21, 1966, denying Appellant's Petition For Rehearing and from its opinion and decision entered May 23, 1966, affirming a final order of the Circuit Court of Cook County, Illinois. The lower court had held that Appellant's Amended Complaint seeking injunctive and other equitable judicial relief against Appellee and his predecessors in office was substantially insufficient in law and equity to support its cause of action against the Illinois Director of Revenue.

(a)

OPINIONS BELOW

The opinion of the Supreme Court of Illinois (Appendix B, *infra*, p. 2a) has been officially reported and appears at 35 Ill. 2d 86 (1966) and at 219 N.E. 2d 494 (Ill. 1966). The decision of the Circuit Court of Cook County, Illinois (Appendix D, *infra*, p. 12a) is not reported.

On November 10, 1964, the United States District Court for the Northern District of Illinois entered an opinion and decision (Appendix E, *infra*, p. 14a) in a predecessor case which Appellant had filed seeking federal injunctive relief. While that opinion and decision is not reported, it is included in the Appendix so as to assist the Court more fully to understand the substantial nature of the penalty question presented as a second and independent issue on this appeal.

(b)

GROUNDS ON WHICH JURISDICTION IS INVOKED

After the United States District Court for the Northern District of Illinois had dismissed Appellant's action without prejudice for reasons set out in its Opinion (Appendix E, *infra*, p. 14a), Appellant brought this action in the Circuit Court of Cook County, Illinois seeking permanently to enjoin the Illinois Director of Revenue from assessing the use taxes at issue on this appeal and also from assessing certain penalties equal to 25% of said use taxes and related service use taxes against it. Appellant alleged in its Amended Complaint that the Illinois Use Tax Act (Ill. Rev. Stat. 1963, c. 120, Secs. 439.1-439.22) was unconstitutional as applied to Appellant in that as so applied said use taxes violated the Due Process and Commerce Clauses of the United States Constitution and also extended the taxing jurisdiction of the State of Illinois to events occurring and privileges exercised exclusively outside of the State of

Illinois. Appellant further alleged that imposition of penalties equal to 25% of said use taxes and service use taxes is repugnant to the Due Process Clause of the United States Constitution in that they constitute a surcharge against Appellant because it sought judicial relief to which it was otherwise entitled.

On May 26, 1965, the Circuit Court of Cook County, Illinois entered a final order striking Appellant's Amended Complaint and dismissing Appellant's said action with prejudice. (Appendix D, *infra*, p. 12a). Appellant then appealed to the Supreme Court of Illinois, and on May 23, 1966, that Court filed an opinion affirming the judgment of the Circuit Court of Cook County (Appendix B, *infra*, p. 2a). A Petition For Rehearing was filed in the Supreme Court of Illinois on June 4, 1966 (R. 19), and on September 21, 1966, the Supreme Court of Illinois overruled said Petition and denied a rehearing in the case (Appendix A, *infra*, p. 1a; R. 20). Appellant filed its Notice of Appeal to the Supreme Court of the United States in the Supreme Court of Illinois on December 19, 1966 (R. 22).

The statutory provisions which confer on the Supreme Court of the United States jurisdiction to review the judgment of the Supreme Court of Illinois on appeal appear at Title 28, United States Code, Section 1257(2) and Section 2101. Cases which sustain that jurisdiction include *American Oil Co.* v. *Neill*, 380 U.S. 451; *Warren Trading Post Co.* v. *Arizona State Tax Commission*, 380 U.S. 685; *Central Railroad Co. of Pennsylvania* v. *Pennsylvania*, 370 U.S. 607; *Connecticut General Life Insurance Co.* v. *Johnson*, 303 U.S. 77.

STATUTES INVOLVED

Relative to the Substantive Due Process—Commerce Clause—Jurisdiction to Tax Question.

Use Tax Act [Ill. Rev. Stat. 1963, c. 120, §§ 439.1-439.22].

"§ 3 [Ill. Rev. Stat. 1963, c. 120, § 439.3]

"A tax is imposed upon the privilege of using in this State tangible personal property purchased at retail on and after August 1, 1955, from a retailer. Such tax is at the rate of * * * % of the selling price of such property * * *."

* * *

"§ 2 [Ill. Rev. Stat. 1963, c. 120, § 439.2]

"'Use' means the exercise by any person of any right or power over tangible personal property incident to the ownership of that property * * *.

"'Purchase at retail' means the acquisition of the ownership of or title to tangible personal property through a sale at retail.

"'Purchaser' means anyone who, through a sale at retail, acquires the ownership of tangible personal property for a valuable consideration.

"'Sale at retail' means any transfer of the ownership of or title to tangible personal property to a purchaser, for use and not for resale in any form as tangible personal property, for a valuable consideration. * * *

* * *"

Relative to the Procedural Due Process Penalty Question.

Use Tax Act [Ill. Rev. Stat. 1963, c. 120, §§ 439.1-439.22].

"§ 12 [Ill. Rev. Stat. 1963, c. 120, § 439.12]

"All of the provisions of Sections * * * 5 * * * of the Retailers' Occupation Tax Act in effect on the effective date of this Act, as subsequently amended, which are not inconsistent with this Act, shall apply, as far as

practicable, to the subject matter of this Act to the same extent as if such provisions were included herein."

Service Use Tax Act [Ill. Rev. Stat. 1963, c. 120, §§ 439.31-439.51].

"§ 12 [Ill. Rev. Stat. 1963, c. 120, § 439.42]

• • •

"All of the provisions of Sections • • • 5 • • • of the Retailers' Occupation Tax Act in effect on the effective date of this Act, as subsequently amended, which are not inconsistent with this Act, shall apply, as far as practicable, to the subject matter of this Act to the same extent as if such provisions were included herein."

Retailers' Occupation Tax Act [Ill. Rev. Stat. 1963, c. 120, §§ 440-453].

"§ 5 [Ill. Rev. Stat. 1963, c. 120, § 444]

"In case any person engaged in the business of selling tangible personal property at retail shall fail to file a return when and as herein required, but shall thereafter • • • file a return and pay the tax, he shall also pay a penalty of 10% of the amount of the tax.

• • •

"In case any person engaged in the business of selling tangible personal property at retail shall fail to file a return, the Department shall determine the amount of tax due from him according to its best judgment and information • • •. The Department shall notify such person or his legal representative • • • of the amount of tax so computed, stating that it proposes to assess such amount together with a penalty of 25% thereof. • • •

• • • "

(c)

QUESTIONS PRESENTED BY THE APPEAL.

I.

The Substantive Due Process—Commerce Clause—Jurisdiction to Tax Question.

Whether the State of Illinois may, without violating the

stitation of the United States, and without exceeding the limited taxing jurisdiction it has by reason of being but a single State in our federal system, assess and collect its Use Tax from a foreign corporation based upon amounts paid outside of Illinois by said foreign corporation to out-of-Illinois manufacturers for (A) manufacturing outside of Illinois certain "POS" advertising items, and (B) placing said "POS" advertising items on board carriers outside of Illinois and causing them to be sent into the State of Illinois consigned to and at the risk of independent third parties doing business in Illinois who are designated by the foreign corporation, where such consignee-independent third parties are not subject to any control by the foreign corporation as to the use or non-use they might make of the "POS" advertising items within the State of Illinois, notwithstanding that:

(1) Said foreign corporation did not use or otherwise exercise any incident of ownership over said POS advertising items within the State of Illinois;

(2) No act or conduct by the foreign corporation with reference to the POS advertising items, the use of which is sought to be taxed, occurred within the State of Illinois;

(3) No act or conduct of said foreign corporation with reference to said POS advertising items looked to Illinois either for a protective environment within the act or conduct could occur, for the determination of the legal consequences of any such act or conduct, and the law of Illinois did not invest any such acts or conduct with jural consequences;

(4) Only states other than Illinois provided that protective environment, determined those legal consequences, and invested the acts and conduct of the foreign corporation with reference to the POS advertising items with juristic effect;

(5) The State of Illinois did not provide the foreign corporation with a *quid pro quo* either with respect to the rights, privileges and powers exercised by said foreign corporation with respect to said POS advertising items or otherwise related to the privilege or its exercise which Illinois did not grant to Appellant but does seek to tax; and

(6) The only uses of, or privileges exercised with respect to, said POS advertising items by said foreign corporation occurred in or during the course of interstate commerce.

II.

The Procedural Due Process Penalty Question.

Whether the State of Illinois may, without violating the Due Process Clause of the Constitution of the United States, assess a 25% penalty surcharge against a foreign corporation because it sought, from the Illinois State Courts, judicial injunctive relief where:

(1) No other remedies afforded by Illinois to the foreign corporation to determine the legality of the assessment were "plain, speedy and efficient", and

(2) Neither the Illinois Use Tax Act nor the Illinois Service Use Tax Act contained penalty provisions except through an incorporation by reference of "not inconsistent" provisions of a separate taxing statute which purported only to penalize persons "engaged in the business of selling tangible personal property at retail" where said foreign corporation did not sell tangible personal property at retail either in Illinois or elsewhere.

(d)

STATEMENT OF THE CASE

1. Facts Material to the Questions Presented (R. 3, pp. 32-42).

MILLER BREWING COMPANY ("Appellant") was organized under the laws of the State of Wisconsin in 1936, is engaged in interstate commerce among the several states, and is authorized to do business within the State of Illinois. Appellant sells malt beverage products from its Milwaukee, Wisconsin, brewery directly to independent wholesale distributors throughout the several states who in turn sell and distribute said products to retailers who sell them to the ultimate consumers. Appellant does not sell any products at retail to ultimate consumers.

As part of its general advertising program, Appellant directed from Wisconsin that certain "Point of Sale" advertising material ("POS advertising items"), such as interior signs, clocks, napkins, coasters and similar devices, be manufactured by sundry businesses (the "fabricators"), some of which were located within Illinois but the bulk of which were located outside of Illinois. This appeal is limited to the question of Illinois Use Tax liability for the POS advertising items which Appellant ordered out-of-Illinois fabricators to produce and Appellant is not appealing the Illinois Supreme Court's decision that it is liable for Use Tax upon items produced for it by the Illinois fabricators.

Pursuant to directions from Appellant, the said fabricators manufactured POS advertising items, retained physical possession of them until they received "drop shipping orders" from Appellant, and then shipped said POS advertising items to the independent wholesale distributors designated by Appellant. In accordance with Appellant's instructions, the out-of-Illinois fabricators delivered POS

advertising items, for which Appellant paid $509,471.20, to independent carriers, shipping charges prepaid, for delivery to designated Illinois wholesale distributors. As soon as those items were delivered to the respective carriers outside of Illinois, Appellant's control over them terminated and it became obligated to pay the fabricators for the cost of fabrication of those items. The fabricators were named as consignors of all shipments, the several Illinois wholesale distributors were named as consignees, and Appellant's only relationship to the entire transaction was to pay for the cost of production, to designate the several consignees, and to pay the cost of shipment. Risk of loss during shipment was in the consignees who were to make any claims for damages in transit. Amounts paid by Appellant for the fabrication and shipment of such items were charged as advertising expenses by Appellant and none of said items had ever been inventoried by Appellant or entered upon its books of account as assets. Appellant never had an intent to acquire ownership of any of the POS advertising items.

Appellant did not control, either directly or indirectly (by the payment of bonuses or assessment of charges for the use or non-use of the POS advertising items), the use or non-use made of the items in Illinois by the Illinois wholesale distributors of its products. The decision as to whether the items would be used or not used within the State of Illinois, and the methods of use, were within the complete discretion of the independent wholesale distributors.

2. The Assessments (R. 3, pp. 41-42, 44-45).

The Illinois Director of Revenue determined that Appellant had paid for the POS advertising items which had been shipped to Illinois distributors from other states; he then determined that Appellant was liable for Illinois Use

Taxes measured by the amounts paid to the foreign suppliers. When Appellant advised Appellee that it denied legal liability for the Use Taxes demanded, Appellee threatened to add a 25% penalty to the amount of the Illinois Use Taxes if Appellant did not pay the amount demanded; and subsequently said Director of Revenue did in fact add that penalty to the assessments at issue in this case.

The Illinois Director of Revenue also added 25% penalties to certain Service Use Taxes, and although Appellant is not appealing the adequately non-federal decision of the Illinois Supreme Court that it was liable for said Service Use Taxes, it is appealing the decision that it was properly held liable for the 25% penalties thereon.

3. The United States District Court Action.

Appellant, in determining what remedy to pursue, was confronted with a dilemma. The Illinois statutory remedies available to aggrieved taxpayers by way of protest, hearing, and court review, the only remedies available to Appellant if it were to avoid the 25% penalties, were not (R. 3, pp. 34-36), and had already been held not to be, "plain, speedy and efficient." *United States, et al.* v. *Department of Revenue of the State of Illinois, et al.*, 191 F. Supp. 723 (N.D. Ill. E.D. 1961); further, the Illinois Administrative Review Act (Ill. Rev. Stat., c. 110, Sec. 265 (1963)) purported to make those remedies the only remedies available to Appellant. Appellant therefore filed suit in the United States District Court for the Northern District of Illinois seeking a permanent injunction against the Illinois Director of Revenue, but on November 10, 1964, that action was dismissed without prejudice because that Court found that notwithstanding the Illinois Administrative Review Act there was "no valid reason to deny the existence of a State Court injunction as a potential remedy in this case." (Appendix E, *infra*, p. 14a).

4. The Decisions of the Illinois Courts.

Appellant then filed this action in the Circuit Court of Cook County, Illinois, against the Illinois Director of Revenue seeking injunctive and other judicial equitable relief from assessments of the Illinois Use and Service Use Taxes and penalties thereon. Appellant alleged in its Amended Complaint (R. 3, pp. 45-57) that the assessment and collection of Illinois Use Taxes would deprive Appellant of its property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States, would constitute a discriminatory and unlawful interference with Appellant's interstate commerce, and would constitute an extension of the scope and operation of the Illinois Use Tax extraterritorially to privileges exercised by Appellant outside the State of Illinois within other States and in the ordinary course of Appellant's interstate commerce activity. Appellant also pointed out in detail in its Amended Complaint the reasons why Appellant's remedies, other than the equitable relief it sought, were legally inadequate (R. 3, pp. 34-36) and alleged that the assessment of the 25% penalties against Appellant would constitute a prior restraint upon Appellant's legal right reasonably to challenge the assessments and hence would deny Appellant its federally guaranteed right to due process of law (R. 3, pp. 45-46).

Upon motion of the Director of Revenue, the Circuit Court of Cook County dismissed the Amended Complaint, specifically finding that the matters set forth therein were substantially insufficient in law and equity to support Appellant's action against the Illinois Director of Revenue; and that court dismissed with prejudice Appellant's said action (Appendix D, *infra*, p. 12a).

Appellant appealed to the Supreme Court of Illinois and in due course filed a Brief (R. 5) and a Reply Brief (R. 9)

both of which amplified in detail the allegations of the Amended Complaint that assessments of the Illinois Use Taxes against Appellant would violate the due process and commerce clauses of the Constitution of the United States (R. 5, pp. 9, 10-13, 22-41; R. 9, pp. 2-3, 5-23); and those Briefs also detailed the reasons why assessments of the 25% penalties would violate Appellant's rights to due process of law under the Fourteenth Amendment as alleged in the Amended Complaint (R. 5, pp. 14, 47-54; R. 9, pp. 3-4, 26-37). The Illinois Supreme Court affirmed (Appendix C, *infra*, p. 10a) the decision of the lower court.

The opinion of the Illinois Supreme Court (Appendix B, *infra*, p. 2a) is not susceptible of easy interpretation, and was responsive only to the non-federal statutory construction aspects of the problem presented. The Court found that Appellant became "constructive owner" of the POS advertising items when it exercised in other states its powers to designate the Illinois recipients, that said "constructive ownership" continued when the items entered into Illinois (presumably because the Amended Complaint failed to meet Illinois rules of pleading concerning nonconclusionary allegations of passage of title and ownership), and thereupon the items were "constructively used" in Illinois by Appellant.

It is regrettable that the Illinois Supreme Court did not go beyond problems of statutory construction and at least make an effort to square its opinion with the broad spectrum of due process and commerce clause cases extensively cited, argued, and relied upon by Appellant. Perhaps this case is distinguishable in a relevant constitutional way, for example, from *American Oil Co.* v. *Neill*, 380 U.S. 451; but if it is (and notwithstanding much study and reflection Appellant has been unable to rationalize any relevant difference), the Illinois Supreme Court should teach all of us the distinction.

Even if it were the intent that the Illinois Supreme Court's decision should operate on the level of the constitutional as well as the interpretive, the semantics of "constructive ownership" and "constructive use" used in an apparent attempt to find some slight Illinois incident to support the tax should not be allowed to darken the guarantees provided by the Constitution of the United States. Perhaps the most fundamental rule of State taxation is that neither State Courts nor State Legislatures, by giving a specific tax a particular name or by the use of some form of words, can remove the duty of the Supreme Court of the United States to consider the nature and effect of a particular tax, an inquiry which will be concerned only with the practical operation of it. *Galveston, Harrisburg and San Antonio Railway Company* v. *State of Texas*, 210 U.S. 217; *St. Louis Cotton Compress Company* v. *State of Arkansas*, 260 U.S. 346; *Carpenter* v. *Shaw*, 280 U.S. 363; *Storaasli* v. *State of Minnesota*, 283 U.S. 57; *International Harvester Co.* v. *Wisconsin Department of Taxation*, 322 U.S. 435; *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69; *Railway Express Agency, Inc.* v. *Virginia*, 347 U.S. 359 (1954). It is also regrettable that the Illinois Supreme Court chose to couple that argument with one concerning the failure of the Amended Complaint to comply with Illinois rules concerning sufficient pleadings of non-ownership, etc., for it is equally well-settled that whether a pleading sets up a sufficient cause of action grounded on the United States Constitution is a question of federal law upon which the Supreme Court of the United States must determine for itself the sufficiency of the allegations displaying the right. *Carter* v. *Texas*, 177 U.S. 442; *First National Bank of Guthrie Center* v. *Anderson*, 269 U.S. 341; *Staub* v. *City of Baxley*, 355 U.S. 313; *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522.

(e)

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

This appeal presents the question whether Illinois may constitutionally impose a Use Tax upon an out-of-State exercise by Appellant of a power of disposition of tangible personal property where Illinois' only relationship to the transaction is that Appellant is authorized to do business within the State of Illinois. It is Appellant's opinion that the Supreme Court of Illinois clearly and fundamentally erred in holding that the Use Tax assessed against it is constitutional; and that taxpayers everywhere have just grievances against that decision being allowed to enter the mainstream of the law of state taxation.

(1) Under the Due Process Clause of the Fourteenth Amendment a State has no power to tax transactions which occur outside of its borders. *American Oil Co.* v. *Neil*, 380 U.S. 451, 458, 459; *Treichler, Executor* v. *Wisconsin*, 338 U.S. 251, 256-257; *Connecticut General Life Insurance Co.* v. *Johnson*, 303 U.S. 77, 81-82; *Union Refrigerator Transit Company* v. *Kentucky*, 199 U.S. 194, 204.

(2) The Due Process Clause of the Constitution of the United States precludes a State from assessing a tax against a foreign corporation unless it provides the taxpayer with a *quid pro quo* related to the taxed property or privilege. *Standard Oil Company* v. *Peck*, 342 U.S. 382, 384-385; *Treichler, Executor* v. *Wisconsin*, 338 U.S. 251, 256-257; *Union Refrigerator Transit Company* v. *Kentucky*, 199 U.S. 194, 202. In this case, each and every phase of the transaction had its locus outside of Illinois. Appellant's power to designate the recipients of the POS advertising items, exercised exclusively outside the State of Illinois, was not dependent upon a privilege or authority granted by Illinois, and Illinois law afforded to Appellant no protection in its exercise of that power of disposition. Since Illinois did not, therefore, provide Appellant with

a *quid pro quo* for the tax it seeks to extract, assessment of it clearly violates the Due Process Clause of the Constitution of the United States. *American Oil Co.* v. *Neill*, 380 U.S. 451; *Connecticut General Life Insurance Co.* v. *Johnson*, 303 U.S. 77, 81-82; *Farmers' Loan and Trust Company* v. *Minnesota*, 280 U.S. 204, 214-215, 217.

(3) The Illinois Supreme Court's opinion seems to seek moral justification for its result in the idea that when all is said and done it is only fair for Appellant to pay the Use Taxes because it benefits when the people of the State of Illinois purchase the malt beverage products (and pay Illinois taxes when they do so) produced by Appellant. But it has been conclusively and well established that a State has no power to tax a foreign corporation, not otherwise properly subject to a particular state tax, merely because the foreign corporation benefits financially from property or events or a market established within the taxing state. *Connecticut General Life Insurance Company* v. *Johnson*, 303 U.S. 77, 80-81; *State Board of Insurance* v. *Todd Shipyards Corp.*, 370 U.S. 451, 454-455; *Farmers' Loan and Trust Company* v. *Minnesota*, 280 U.S. 204, 209; *Rhode Island Hospital Trust Company* v. *Doughton*, 270 U.S. 69.

(4) The Commerce Clause of the Constitution of the United States also precludes the assessment by Illinois of its Use Tax against Appellant since all privileges and powers exercised by it in relation to the POS advertising items took place in States other than Illinois and in the course of interstate commerce. *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, 344; *Michigan-Wisconsin Pipeline Co.* v. *Calvert*, 347 U.S. 157, 167-168; *Memphis Steam Laundry Cleaner, Inc.* v. *Stone*, 342 U.S. 389, 393; *Joseph* v. *Carter and Weekes Co.*, 330 U.S. 422, 433.

The procedural due process question concerning the 25% penalties is also substantial in that the assessment of those

penalties, which would not have been imposed against Appellant if it had paid the taxes demanded of it (R. 3, pp. 41-42, 44-45), constitute a charge for seeking judicial relief against assessment of the taxes because the only alternative Illinois remedies of protest, hearing and court review were not "plain, speedy and efficient." *United States* v. *Department of Revenue of the State of Illinois,* 191 F. Supp. 723, 727 (N.D.Ill. E.D. 1961). Penalties which serve to discourage resort to the Courts for determination of the validity or invalidity of an application of a legislative enactment are violative of the Due Process Clause of the United States Constitution, Ex Parte *Young,* 209 U.S. 123, even if the litigant ultimately does not prevail upon the substantive merits of its case, *Oklahoma Operating Company* v. *Love,* 252 U.S. 331.

This case represents far, far more than an isolated instance of the promulgation of injustice by a state court, the decisions of the Supreme Court of the United States to the contrary notwithstanding. The Use Tax is in many respects the tax of the future and its application, as this case indicates, long ago outran the original purpose of dissuading residents of the taxing state from evading the sales tax by purchasing goods in other places. The question presented by this case is of general importance to all states and to all taxpayers: Are use taxes to be limited by constitutional standards of "local incidents," "nexus," and *"quid pro quo,"* or may a state assess such taxes with impunity by finding in-state uses through the application of "attenuated subtleties."

CONCLUSION

After the start of this litigation, this Court decided the case of *American Oil Co.* v. *Neill*, 380 U.S. 451. The decision in that case should have concluded this case in favor of Appellant, but the Illinois State Courts refused to acknowledge the existence of that case much less be bound by it. Appellant respectfully suggests that perhaps the integrity of our State-Federal judicial system fairly requires a summary reversal of the decision of the Supreme Court of Illinois on the basis of the *American Oil Co.* case. This procedure has been followed in exceptional cases. *United States* v. *Haley*, 358 U.S. 644.

In any event, the questions presented by this Appeal are substantial and of general and public importance. Probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX A

UNITED STATES OF AMERICA

STATE OF ILLINOIS
SUPREME COURT } ss.

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the twelfth *day of* September *in the year of our Lord, one thousand nine hundred and* sixty-six, *within and for the State of Illinois.*

* * *

BE IT REMEMBERED, that, to-wit: on the 21st day of September, A.D. 1966, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

Miller Brewing Company, a Wisconsin corporation,
Appellant
No. 39529 vs.
Marshall Korshak as Director of Revenue,
Appellee
} Appeal from Circuit Court Cook County

And now, on this day, the Court having duly considered the petition for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a rehearing in this cause.

APPENDIX B

Docket No. 39529—Agenda 48—January, 1966.

Miller Brewing Company, Appellant, v. Marshall Korshak, Director of Revenue, Appellee.

Mr. JUSTICE SCHAEFER delivered the opinion of the court:

The plaintiff, Miller Brewing Company, a Wisconsin corporation licensed to do business in Illinois, brought this action against the Director of Revenue to enjoin him from taking any steps to assess against and collect from the plaintiff any use tax or service use tax, or penalties, with respect to certain items of tangible personal property for the period from January 1, 1961, to May 31, 1964, on the ground that such taxes would be illegal and unconstitutional. The defendant's motion to dismiss plaintiff's amended complaint was granted and plaintiff appeals. The revenue and constitutional questions are involved.

We shall consider first the allegations of the amended complaint that relate to the notice of proposed use tax assessment that was served upon the plaintiff. The plaintiff manufactures "malt beverage products" in Wisconsin and sells them directly to "independent wholesale distributors" who, in turn, sell to retailers. It does not sell any of its products directly either to retailers or to consumers. "In the ordinary course of its business plaintiff has found it advisable to promote a demand for its malt beverage products among ultimate consumers by providing for the manufacture and fabrication of certain 'point-of-sale' advertising material (hereinafter referred to as 'POS' advertising items') such as interior neon signs, clocks and other devices intended to encourage a demand for the products of Plaintiff among those who congregate at the point of ultimate sale of Plaintiff's products." The fabricators retained the

items until Miller sent them a "requisition drop shipping order" directing them where to ship the items. In the period relevant here, Miller paid a total of $592,879.19 for items shipped to Illinois wholesalers. Of this total, $83,407.99 was paid to Illinois fabricators; the bulk of the remainder was paid to fabricators located in Minnesota and Wisconsin.

The amended complaint alleged that "Plaintiff did not intend to acquire title to or property in any of said POS advertising items" except those shipped to its Wisconsin warehouse. It continued:

> "14.2. Except for the Wisconsin warehouse items, none of said POS advertising items shipped to the Illinois wholesale distributors had ever been inventoried by the Plaintiff or entered upon the books of account of the Plaintiff.
>
> "14.3. Except for the aforementioned Wisconsin warehouse items, Plaintiff was not named, either as consignor or otherwise, upon any of the bills of lading or other shipping documents which accompanied the respective shipments.
>
> "14.4. The fabricators and suppliers delivered the POS advertising items to independent carriers, shipping charges prepaid, for delivery to the Illinois Wholesale distributors.
>
> "14.5. As soon as the fabricators and the suppliers delivered the said POS advertising items to the respective carriers, Plaintiff became legally obligated to pay said fabricators and suppliers for the cost of fabrication of said POS advertising items and to reimburse them for freight charges which had been prepaid by them.
>
> "14.6. The respective suppliers were named as consignors of all shipments and the several Illinois wholesale distributors were named as consignees. Risk of loss during shipment was in the consignees and all claims for damage were to be made by the consignees.

"14.7. Title to the POS advertising items passed from the suppliers to the Illinois wholesale distributors when said items were delivered to the respective carriers at the points of origin of the shipments.

"14.8. If, contrary to its intent, the Plaintiff at any time acquired any ownership, title or interest in and to any of said POS advertising items other than the Wisconsin warehouse items, any such ownership, title or interest was relinquished by Plaintiff no later than the time when said POS advertising items were placed with carriers at the respective points of origin of the respective shipments."

The complaint further alleged that prices to the wholesalers "were not increased to cover the cost to Plaintiff of the POS advertising items;" that "Plaintiff did not direct or control any such distributors in the use or distribution of said items nor did Plaintiff pay any bonuses or any charges for the use or non-use of such items," but the wholesalers "usually distributed the POS advertising items to various Illinois retailers who would then use said items at the point-of-sale to encourage a demand for Plaintiff's malt beverage products among ultimate consumers thereof."

As we read the complaint, what the plaintiff says is that it caused the items of tangible personal property here involved to be manufactured in order to promote the sale of its product. It paid for them, directed their shipment to particular wholesalers in Illinois, and paid the freight charges. But it also says that it never became the owner of these items because it did not ever intend to take title to them, and did not inventory them or enter them upon its books of account. We think those considerations are irrelevant. The plaintiff caused the items to be brought into being, paid for their manufacture and exercised complete power of disposition over them. Even if, in some other context or for some other purpose, someone other than the plaintiff

might somehow be regarded as the owner of the items in the state in which they were manufactured, the dominion exercised over them by the plaintiff is sufficient to establish the plaintiff as their owner for the realistic purposes of a taxing statute.

The only conclusion that we can reach from the allegations of the complaint is that the plaintiff was the owner of the items in question when it directed that they be shipped into Illinois in order to stimulate the sale of its product. They were used in this state for that purpose. The complaint does not allege that these items of personal property fall within any of the statutory exceptions dealing with property brought into this state by an owner. (See Ill. Rev. Stat. 1963, chap. 120, par. 439.3.) Unless, therefore, the ownership of these items was transferred to someone else, the property was used in Illinois by the plaintiff, and the plaintiff is subject to the use tax. We turn, therefore, to the allegations of the complaint that are apparently intended to divorce the plaintiff from ownership of this property.

Paragraph 14.7 of the complaint alleges: "Title to the POS advertising items passed from the suppliers to the Illinois wholesale distributors when said items were delivered to the respective carriers at the points of origin of the shipments." This paragraph is based upon the assumption that the plaintiff never acquired any interest in or title to the items, a theory that we are unable to accept. Moreover, the allegation as to the passage of title is unmistakably a conclusion of law rather than an allegation of fact. (*Leitch* v. *Hine*, 393 Ill. 211; *Wolcott* v. *Village of Lombard*, 387 Ill. 621, 626; *Grove* v. *Templin*, 320 Ill. 597, 602). Yet the facts as to the transactions are peculiarly within the knowledge of the plaintiff.

Paragraph 14.8 of the complaint alleges that if the plaintiff at any time acquired any ownership, title or interest in and to any of the items, and we have held that it did, "any such ownership, title or interest was relinquished by the plaintiff * * *." Here, again, the complaint studiously fails to allege facts.

In the context of this statute, we are unaware of the meaning of an allegation that title, interest or possession has been "relinquished." The complaint nowhere alleges that the items were sold to the Illinois wholesale distributors or to anyone else. The allegation that the plaintiff did not increase prices to its wholesalers to cover these items seems designed to negative a sale, and in the trial court the plaintiff did not argue that a sale had taken place. Similarly, there is no allegation that the items were given by the plaintiff to the Illinois wholesalers or to anyone else. The original complaint alleged that these items "are furnished gratuitously to the several independent distributors of Plaintiff." During the argument before the trial court the plaintiff refused to concede that there had been a gift, and in its amended complaint, filed after that argument, the allegation that the items were "furnished gratuitously" was omitted.

The complaint has been carefully drafted to avoid a plain and a simple statement of the actual transactions between the plaintiff and the wholesale distributors. Whether this was done in order to avoid taking a position that might result in the imposition of a tax upon its wholesale or retail distributors, we do not know. Like the circuit court, we must determine the legal sufficiency of the amended complaint that the plaintiff has chosen to file, and in our opinion the circuit court properly held that it failed to establish the illegality of the use tax proposed to be assessed against the plaintiff.

In its briefs in this court the plaintiff has argued extensively numerous questions under the due process and commerce clauses of the Federal constitution. But the amended complaint that it filed does not assert facts that would call into operation the constitutional doctrines that it advances.

With respect to the proposed assessment under the service use tax, the amended complaint alleged that "Plaintiff has determined that the demand for its products will be increased if the various retailers of said products display, outside of their several places of business, signs which disclose that the individual retailer is engaged in the sale of Plaintiff's products." The signs were shipped to plaintiff's wholesale distributors and were installed at "the several places of business of those Illinois retailers who sell the malt beverages produced by Plaintiff to ultimate consumers thereof."

The amended complaint continued: "Plaintiff did not lease said signs either to the wholesalers or retailers who used them, and Plaintiff did not receive rent or other payments either from the distributors or from the retailers for the use of said signs. While it is possible that, with respect to an insignificantly small number of such signs, Plaintiff might have exercised a right or power over such signs during the period involved, as a general proposition Plaintiff merely retained ownership of said signs while they were located within the State of Illinois and did not exercise any rights or powers over such signs incident to that ownership during the period involved."

Plaintiff contends that the signs which it concededly owns in Illinois are not subject to the Service Use Tax Act. That act imposes a tax on "the privilege of using in this State real or tangible personal property acquired as an inci-

dent to the purchase of a service from a serviceman." Apparently the individualized character of these signs accounted for their assessment under the service use tax. In any event, the plaintiff does not contend that it did not purchase service from a serviceman. Its contention is rather that it does not, in the language of the act, exercise "any right or power over tangible personal property incident to the ownership of that property." To tax its signs under the Service Use Tax Act would, plaintiff contends, equate "the Service Use Tax with a property tax, assessable merely because of ownership."

The fact remains, however, that the plaintiff used these signs in Illinois, for its benefit, in the natural way in which signs are used, by causing them to be put up where people could look at them. The power to allow property one owns to be used for one's benefit in this manner is the "exercise" of "an incident of ownership" under the act. The contention that the tax is a "double tax" is clearly without merit.

Finally, it is the plaintiff's position that regardless of its liability for the principal amounts of the taxes assessed against it, the 25% penalties imposed for failure to file returns should not be sustained. It argues first that the penalties are not authorized by the taxing statutes, and second, that if the statutes authorize the penalties, they are invalid under the due-process clauses of the State and Federal constitutions. Section 12 of the Use Tax Act, and section 12 of the Service Use Tax Act, each provide that certain designated sections of the Retailers' Occupation Tax Act "which are not inconsistent with this Act, shall apply, as far as practicable, to the subject matter of this Act to the same extent as if such provisions were included herein." (Ill. Rev. Stat. 1963, chap. 120, pars. 439.12; 439.42.) Section 5 is one of the sections of the Retailers' Occupation Tax Act thus incorporated by reference. One of the main purposes of that

section is to provide for penalties in certain cases, including a 25% penalty for failure to file a return, (Ill. Rev. Stat. 163, chap. 120, par. 444.) and we think it is clear that this penalty provision is applicable to the use tax and the service use tax. *Cf. Turner* v. *Wright*, 11 Ill.2d 161.

In our opinion the penalty provisions do not deprive the plaintiff of its constitutional rights. As is true of many other taxes, the information from which the amount of these taxes must be computed is peculiarly within the knowledge of the taxpayer. In *Helvering* v. *Mitchell*, 303 U.S. 391, 82 L. Ed. 917, the validity of sanctions designed to ensure full and honest disclosure was sustained, and their civil rather than criminal character was recognized. The imposition of a 25% penalty for failure to file a return has been approved in many cases. (*Offutt* v. *Commissioner*, (4th cir. 1960) 276 F.2d 471; *Henningsen* v. *Commissioner*, (4th cir. 1957) 243 F.2d 954; *McAlpine Land & Development Co.* v. *Commissioner*, (4th cir. 1942) 126 F.2d 163; *Noteman* v. *Welch*, (1st cir. 1939) 108 F.2d 206.) Other than its asserted belief that it was not liable to pay the taxes, the plaintiff has shown no reason to justify its failure to file a return; similar assertions have been held ineffective to avoid a penalty for failure to file a return. See, *e.g. Heman* v. *Commissioner*, (8th cir. 1960) 283 F.2d 227, 233.

For the reasons stated, the judgment of the circuit court is affirmed.

Judgment affirmed.

APPENDIX C

UNITED STATES OF AMERICA

STATE OF ILLINOIS } ss.
SUPREME COURT }

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the ninth *day of* May *in the year of our Lord, one thousand nine hundred and* sixty-six, *within and for the State of Illinois.*

* * *

Be It Remembered, that, to-wit: on the 23rd *day of* May *1966, the same being one of the days of the term of Court aforesaid the following proceedings were, by said court, had and entered of record, to-wit:*

Miller Brewing Company, a Wisconsin corporation,
Appellant
vs.
Marshall Korshak as Director of Revenue,
Appellee

No. 39529

Appeal from Circuit Court Cook County 64 CH 6489

Error to

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the

record and proceedings aforesaid, nor in the rendition of the judgment *aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.*

THEREFORE, *it is considered by the Court that the* judgment of the Circuit Court of Cook County *aforesaid,* BE AFFIRMED IN ALL THINGS AND STAND IN FULL FORCE AND EFFECT, *notwithstanding the* said matter and things therein assigned for error. xxxxxxxxx

I, MRS. EARLE BENJAMIN SEARCY, *Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.*

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 27th *day of* September, *1966.*

/s/ Mrs. Earle Benjamin Searcy,

Clerk, Supreme Court of the State of Illinois

APPENDIX D

STATE OF ILLINOIS } ss
COUNTY OF COOK }

IN THE

CIRCUIT COURT OF COOK COUNTY

MILLER BREWING COMPANY,
a Wisconsin corporation,
Plaintiff,

vs.

MARSHALL KORSHAK,
as Director of Revenue,
Defendant.

IN CHANCERY
No. 64 CH 6489

ORDER STRIKING AMENDED COMPLAINT
AND
DISMISSAL OF ACTION

THIS MATTER COMING ON TO BE HEARD on the Motion of Defendant, MARSHALL KORSHAK, as Director of Revenue, by WILLIAM G. CLARK, Attorney General of the State of Illinois, his Attorney, to have Defendant's motion to strike and dismiss Plaintiff's original complaint heretofore filed, stand as Defendant's motion to strike and dismiss Plaintiff's amended complaint; the Court having jurisdiction over the parties and the subject matter; counsel for both parties present and after a full and complete hearing; and

The Court finding that the Amended Complaint of MILLER BREWING COMPANY and the matters therein

contained are substantially insufficient in law and equity to support Plaintiff's action against the Defendant;

It is HEREBY ORDERED, ADJUDGED, and DECREED that:

1. Defendant's Motion to Strike the Amended Complaint of Plaintiff, MILLER BREWING COMPANY, is granted; and

2. Plaintiff, MILLER BREWING COMPANY, shall take nothing by its action which shall be, and is hereby, dismissed with prejudice.

3. Plaintiff take nothing and that Defendant go hence without day.

ENTER: /s/ WILLIAM V. BROTHERS
Judge

Judge Wm. V. Brothers
May 26, 1965
Circuit Court

APPENDIX E

IN THE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MILLER BREWING COMPANY, a Wisconsin corporation,
Plaintiff,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS, and HARRY L. HULMAN, Director of Revenue,
Defendants.

No. 64 C 1222.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the HONORABLE EDWIN A. ROBSON, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Tuesday, November 10, 1964, at 10:00 o'clock a.m.

(The Court gave attention to other matters on the call, after which the following proceedings were had herein, to-wit:)

THE CLERK: 64 C 1222, Miller Brewing Company, against Department of Revenue of the State of Illinois, for ruling on defendants' motion to dismiss and plaintiff's motion for preliminary injunction.

THE COURT: Good morning.

The Miller Brewing Company, a Wisconsin corporation, moves this Court to issue a preliminary injunction against

the levying and collecting of certain taxes under the Illinois Use Tax, Illinois Revised Statutes, Chapter 120, Section 439.1, et seq. (1963) and Illinois Service Use Tax, Illinois Revised Statutes, Chapter 120, Section 439.31, et seq. (1933).

The plaintiff company contends that jurisdiction exists in this court by virtue of Title 28 U.S.C. Section 1331, 1332 and 1341. A motion to dismiss has been filed by the Illinois Attorney General, on behalf of the defendants, alleging that a Federal Court cannot assume jurisdiction to restrain State tax assessments when a speedy and efficient remedy is available in the Illinois State Courts. The Court finds merit in the defendants' position.

The Miller Brewing Company employs independent wholesale distributors who sell and distribute malt beverage products to Illinois retail outlets. To promote sales at these outlets, the Miller Company has expended large sums of money on "point-of-sale" advertising materials such as exterior signs, clocks, et cetera. These items are sent from the fabricators and suppliers directly to the independent distributors who thereafter redistribute said advertising material to Illinois beverage retailers.

The plaintiff becomes liable for the cost of these materials upon shipment by the fabricator and suppliers to the independent distributors. On June 4, 1964, agents of the Illinois Department of Revenue audited plaintiff's books and determined that between July 1, 1961 and May 31, 1964, the brewery became liable for Illinois Use and Service Use Taxes. This conclusion was predicated upon a finding by the auditors that Miller Company exercised rights and powers over the advertising material sent into the State of Illinois.

The plaintiff denied that any benefits were derived which created a taxable incident favorable to the state, and further maintains that assessing any taxes on these items constitutes an unlawful expansion of the tax statutes to non-residents. However, the total taxes levied to date are $17,896.93 and when the plaintiff refused payment, a 25 per cent penalty was added, bringing the over-all amount to $22,371.17.

Miller Brewing Company asserts that jurisdiction in this Court is predicated upon the Johnson Act, Title 28 U.S.C. Section 1341. That Act provides the District Court with authority to enjoin the collection of state taxes when the taxpayer has no "plain, speedy and efficient remedy" to contest their assessment. The absence of any such remedy is asserted to be evidenced herein by two factors; the Use and Service Use Taxes do not provide for the payment of interest when taxes paid under protest are ultimately proved invalid, and when seeking to review any assessment, no provision allows payment of the bonding cost to a successful taxpayer-litigant.

However, the Johnson Act requires that a taxpayer must exhaust all available state procedures before requesting an injunction. Delaware, Lackawanna & Western Railroad Co. v. Kinglsey, et al., 189 Fed. Supp. 39 (D. N.J. 1960). There must, however, be more than a probability that such remedy does exist in the state court. Mountain States Power Company v. Public Service Commission of Montana, et al., 299 U.S. 167 (1936).

When contesting a tax assessment, the taxpayer can proceed by one of three statutory methods once the final assessment has been issued. These methods are: paying the tax under protest and filing a suit to enjoin transferring said funds from the protest fund, Illinois Revised Statutes,

Chapter 127, Paragraph 172(a), (1963), followed by filing a credit claim within 60 days; paying the tax under protest and filing a claim for credit, or; contesting the tax after the department issues proposes assessments by protest, and requesting hearings. Illinois Revised Statutes, Chapter 110, Paragraph 264 (1963).

However, an independent ground of equitable relief is available since the State court will enjoin the collection of any tax which is unauthorized by law or levied upon property exempt from taxation. Goodyear Rubber Company v. Tierney, 411 Ill. 421 (1952).

A revenue statute may be illegal either because the provisions therein are unconstitutional, Time Incorporated v. Harry L. Hulman, Director of Revenue, et al., Advertising Publications Inc. et. al. v. Same Appellees, Docket No. 38470 and 38582 (1964), or because the statute's provisions are improperly applied to the parties in question. Baumgardt d/b/a A & B Shop v. Isaccs, 29 Ill. 2d 29 (1963); Owens-Illinois Glass Company v. McKibbin, 385 Illinois 245 (1944). In both of the above situations, an injunction was available once the requisite showing of illegality had been made.

An examination of the plaintiff's pleadings indicates a misconception concerning the nature and availability of injunctive relief. In the complaint, Miller Brewing Company requests this Court to enjoin and declare Illinois Use and Service Use Taxes non-applicable to the plaintiff's transactions. However, a supporting brief filed thereafter states that no challenge is being made toward the illegality of the taxes, per se, although an obvious disagreement exists with the applied tax assessment in this case.

At this juncture a state injunction procedure must resolve the issue of tax application before the remedy ques-

tion, for example, the non-availability of interest and bonding costs, is ripe for this Court's consideration under Section 1341.

The plaintiff contends that United States v. Department of Revenue of State of Illinois, 191 Fed. Supp. 723 (N.D. Ill. 1961), vacated 368 U.S. 30 (1961), 202 Fed. Supp. 757 (N.D. Ill. 1962), affirmed 371 U.S. 21 (1962) is authority for this Court's assumption of jurisdiction under Section 1341.

However, that case is clearly distinguishable because:

> ". . . it is conceded by plaintiffs that Olin Mathieson is a retailer subject to the occupation tax of Illinois. Therefore, it may not invoke the remedy of injunctive relief in the Courts of Illinois."

The Olin Mathieson Company made the very concession that plaintiff herein regards as a primary issue and this Court considers a prerequisite to assuming jurisdiction. The Miller Brewing Company also cites United States, et al. v. Otis W. Livingston, et al., 179 Fed. Supp. 9 (E.D. S.C. 1959), another state revenue decision heard by the Federal Court. This case is not persuasive because South Carolina offered no alternative remedies other than suing for a refund after prepayment of the tax.

Furthermore, an independent jurisdictional ground existed since the state was attempting to tax sovereign property otherwise immune under the Constitution and laws of the United States.

The Miller Brewing Company seems to deny that any injunctive relief can be available, after the assessment, because of the prohibitions of the Administrative Review Act, Illinois Revised Statutes, Chapter 110, Section 265 (1963).

This Act proscribes review of any agency to which the act is applicable by stating that:

". . . any other statutory, equitable or common law mode of review of decisions or administrative agencies heretofore available shall not be employed after the effective date hereof."

Notwithstanding this mandate against judicial review, the authorities in Illinois find no constitutional authority in the state legislature whereby the state courts can be deprived of their inherent equitable power to issue injunctions. Peoples Gas, Light and Coke Company v. Slattery, et al., 373 Ill. 31 (1940); Chicago and North Western Railway Company v. Lyons, 148 Fed. Supp. 787 (S.D. Ill. 1957).

The Court therefore finds no valid reason to deny the existence of a state court injunction as a potential remedy in this case.

This Court orders the present temporary restraining order be vacated and denies the plaintiff's motion for a preliminary injunction.

The defendant's motion to dismiss will be granted but without prejudice, and that will be the order of the Court.

MR. TESCHNER: Do you wish a draft order?

THE COURT: Yes, a draft order, of course.

MR. TESCHNER: All right, thank you, your Honor.

(Which were all the proceedings had in the above-entitled cause on the day and date aforesaid.)

* * *

CERTIFICATE

I HEREBY CERTIFY that the proceedings had in the above-entitled cause before the HONORABLE EDWIN A. ROBSON, one of the Judges of said Court on Tuesday, November 10, 1964, was reported stenographically under

my direct personal supervision, and that the foregoing transcript consisting of pages 1 to 10, inclusive, is a true, correct and complete transcript of the official shorthand notes so made as aforesaid.

/s/ CLAUDE W. YOUKER, JR.

Claude W. Youker, Jr., Official Court Reporter, United States District Court, Northern District of Illinois, Eastern Division.